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Supreme Court of the United States

OCTOBER TERM, 1963

No. 897

CARMINE LA GRECI,
Claimant-Petitioner,

against

GREENE, TWEED & COMPANY,
Employer-Respondent,

SPECIAL FUND CONSERVATION COMMITTEE,
Carrier-Respondent,

WORKMEN'S COMPENSATION BOARD,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

BRIEF FOR RESPONDENT, WORKMEN'S COMPENSATION BOARD, IN OPPOSITION

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Opinions Below

The New York Appellate Division, Third Department, unanimously affirmed the decision of the Workmen's Compensation Board which disallowed petitioner's claim for

disability benefits. The Appellate Division's opinion is reported at 17 App. Div. 2d 673, 230 N.Y.S. 2d 528 (1962), and is reproduced in the appendix to this brief. Subsequently, the Appellate Division denied petitioner's motion for resettlement of the order of affirmance, 17 App. Div. 2d 753 (1962), and the Court of Appeals dismissed his motion for leave to appeal on the ground that the motion was not made within the time specified in New York Civil Practice Act § 592(3). 12 N. Y. 2d 644, 840, 187 N. E. 2d 470 (1962).

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(3).

Statutes Involved

The pertinent provisions of the New York statutes are set forth in the appendix to this brief.

Statement of the Case

On February 11, 1943, petitioner was injured while at his place of employment (21a).* He returned to work on February 18, 1943, one week after the accident, and filed a claim with the Workmen's Compensation Board (21a, 23a). He was awarded $125.00 for facial disfigurement and the case was closed with a finding that the claimant had suffered no compensable lost time from the accident (20a). The case subsequently was reopened by the Board on petitioner's request, but was closed after hearings showed no reason for changing the previous determination (19a, 24a).

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* Unless otherwise indicated, numbers in parentheses refer to pages in the claimant's appendix, printed for the use of the Appellate Division and filed by petitioner in this Court.

Then, on June 12, 1958, petitioner again requested that his claim be reopened (26a-28a). The Board thereupon reopened the case for a second time. Since the employer's liability was now barred by the passage of time, the Special Fund for Reopened Cases defended the claim, pursuant to New York Workmen's Compensation Law § 25-a (18a). At the hearing, petitioner produced medical testimony that the 1943 accident may have aggravated a pre-existing condition leading to his present disability (52a-63a), while the Special Fund produced medical testimony that there was no such causal relation (64a-72a). The Referee disallowed the claim, holding that the accident did not cause petitioner's disability (17a).

Petitioner then applied to the Workmen's Compensation Board to review the Referee's decision, and the Board ordered that petitioner be examined by an impartial orthopedist to obtain his opinion on the question of causal relation (13a-14a). Petitioner objected to the reference to an impartial specialist (85a-89a, 92a-103a) and informed the Board that he would not submit to such an examination (105a-107a). Pursuant to Workmen's Compensation Law § 19, the Board suspended further proceedings until petitioner agreed to be examined (8a-11a), whereupon he complied under protest (109a-110a). The impartial specialist designated by the Board then examined petitioner and filed a detailed report concluding that there was no causal relation between the claimed current disability and the 1943 accident (40a-44a). Following his report, the impartial specialist appeared at a hearing before the Referee, where he was cross-examined at length by petitioner's attorney as to the findings and opinions set forth in his report (77a-84a). Upon the conclusion of this testimony, the case was referred back to the Board, which found, on the entire record, that the 1943 injury did not cause petitioner's claimed disability and disallowed his claim (6a).

The Appellate Division, Third Department, unanimously affirmed the Board's decision. Appendix, pp. 9-12. The

Appellate Division's order was entered on July 25, 1962, and a copy thereof was received by petitioner's attorney on August 1, 1962. On August 10, 1962, petitioner moved to resettle the order of affirmance; this motion was denied on September 26, 1962. (Pet'n for cert., p. 14.) (The above dates are taken from the State Reporter's Notes, 12 N. Y. 2d 840 [1962]).

On October 24, 1962, almost three months after the order of affirmance had been entered and served, petitioner moved for leave to appeal to the Court of Appeals. This motion was dismissed on the ground that it was made after the time specified in New York Civil Practice Act § 592(3), which requires that such motions be made within thirty days after service of the order of the Appellate Division. (Pet'n for cert., pp. 15-16.)

Petitioner now seeks certiorari to review the decision of the Court of Appeals. He argues, first, that the Court of Appeals should have considered his motion for leave to appeal despite the passage of the statutory time limit, and, second, that petitioner's constitutional rights to due process and equal protection of the laws were impaired because (a) he had to use his own funds to hire a medical expert in order to reopen his claim, (b) he should have received disability benefits even though he suffered no loss of earnings causally related to his accident, and (c) the Board required that he be examined by an impartial physician to substantiate his claims and denied him the right to "rebut" that physician's testimony.

We shall show that the decision of the Court of Appeals rests purely on a question of state procedural law and, in any event, that petitioner was accorded the full measure of his constitutional rights by the Workmen's Compensation Board and the State courts.

POINT I

Since petitioner did not file a timely appeal to the New York Court of Appeals, the instant petition is barred by 28 U.S.C. § 1257.

It is axiomatic that certiorari lies only to review judgments of a state court which have been "rendered by the highest court * * * in which a decision could be had * * *" 28 U.S.C. § 1257. Petitioner here has failed utterly to comply with this requirement. If, as he claims, this case presents questions arising under the Fourteenth Amendment, he could have appealed as of right to the New York Court of Appeals. New York Civil Practice Act § 588(1)(a). He has never done this, and the instant petition is therefore fatally defective. *Southern Elec. Co.* v. *Stoddard*, 269 U. S. 186, 188 (1925). See *Mullen* v. *Western Union Beef Co.*, 173 U. S. 116 (1899). Even if petitioner were limited to an application for leave to appeal to the Court of Appeals—the route which, for some exotic reason, he chose to travel in this case—he would have to make such an application before he could petition for certiorari. *Stratton* v. *Stratton*, 239 U. S. 55 (1915). Here, he did not do so until the time limit for such an application had lapsed. Civil Practice Act § 592(3). Thus, the instant petition is barred by 28 U.S.C. § 1257.

In any event, the decision of the state Court of Appeals barring relief because of the lapse of the statutory period constitutes an adequate non-federal ground of decision preventing further review. *Bailey* v. *Anderson*, 326 U. S. 203, 206-07 (1945); *Herb* v. *Pitcairn*, 324 U. S. 117, 125-26 (1945).

To avoid the obvious impact of his failure to seek timely relief from the Court of Appeals, petitioner argues (Pet'n. pp. 6-7) that (a) the Court of Appeals should have treated

his application for leave to appeal as though it were a notice of appeal taken as of right, and (b) that the Court of Appeals should have calculated his time to seek relief from the date of entry of the Appellate Division's order denying the motion for resettlement rather than from the date of entry of the order of affirmance. Both contentions clearly are matters of state procedural law reserved solely for the state courts. Moreover, it is clear from the facts set forth in the State Reporter's Notes, 12 N. Y. 2d 840 (1962), that petitioner's application for leave to appeal was made even after the 60-day period allowed by Civil Practice Act § 592(1) for appeals as of right. *Cf.* Civil Practice Act §592(5)(d). As for the motion for resettlement, it is clear under New York law that unsuccessful motions for resettlement do not extend appeal time. COHEN & KARGER, POWERS OF THE NEW YORK COURT OF APPEALS 436 (rev. ed. 1952). *Cf. Russell* v. *Board of Education*, 298 N. Y. 853 (1953).

POINT II

The petition is concerned solely with the interpretation of New York Workmen's Compensation Law § 13(d) and raises no federal question.

Even if petitioner had properly lodged his appeal with the highest court of New York, the instant petition would nevertheless be frivolous. It is concerned solely with the interpretation of New York Workmen's Compensation Law § 13(d) and poses no question even remotely related to any provision of the federal Constitution.

Petitioner argues, first, that he was denied due process and equal protection of the laws because he had to use his own funds to hire a medical expert in order to reopen his claim. This contention is patently frivolous. He certainly stood in no better position than any prospective litigant in a civil case, who must hire expert witnesses in order to

meet his burden of proof. If anything, petitioner was entitled to less indulgence than the average litigant, since he had already litigated his cause and was seeking to reopen a closed determination. As § 13(d) makes perfectly clear and as the Appellate Division pointed out in its decision in this case, the Workmen's Compensation Board has complete discretion to determine whether or not to appoint an impartial expert and, if so, at what stage of the proceedings to appoint him. In any event, petitioner succeeded in retaining his own experts and could not have been prejudiced by the Board's failure to appoint one at the outset of the proceedings.

Petitioner's second argument, that he should have received disability benefits even though he suffered no loss of earnings causally related to his accident, obviously is solely a matter of state law and is irrelevant to his claims of unconstitutional treatment.

His third argument, that it was unconstitutional for the Board's review panel to require that he be examined by an impartial physician and to deny him the right to "rebut" that physician's testimony, is untenable. In fact, it is difficult to grasp its tenor. If petitioner suggests that he was prevented from cross-examining the witness, his claim is belied by the record. Section 13(d) guarantees petitioner the right to cross-examine the impartial specialist and, as we already have pointed out, petitioner's attorney cross-examined the witness at great length. If, on the other hand, petitioner claims a constitutional right to introduce additional witnesses to bolster his case-in-chief, his claim is equally unjustified. There must be an end to litigation at some point; and neither side—once heard—can insist that it be heard once more. In any event, petitioner never asked to be allowed to introduce additional evidence after the testimony of the impartial specialist.

The paucity of petitioner's constitutional claims is perhaps best illustrated by the three cases he cites (Pet'n,

pp. 8, 10) as conflicting with the decision below. None of the three has any relation whatever to this case. *New York Central R. R.* v. *Bianc*, 250 U. S. 596 (1919), holds that a state is not bound by the Constitution to restrict compensation payments to loss of earning power. *Market Street Ry.* v. *Railroad Comm'n*, 324 U. S. 548 (1945), holds constitutional an order of a state administrative agency requiring a railroad to reduce its fare. *Young* v. *Ragen*, 337 U. S. 235 (1949), is a state habeas corpus proceeding which resulted in a remand to determine the ground for the state judgment.

The instant petition is barren of any color of constitutional claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
April 2, 1963.

Respectfully submitted,

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APPENDIX

Opinion of Appellate Division, Third Department.

SUPREME COURT

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT

Decision handed down July 13, 1962.

In the Matter of the Claim of Carmine LiGreci, Appellant,

Greene, Tweed & Company et al., Respondents.

Special Fund for Reopened Cases under Sec. 25-a, Respondents.

Workmen's Compensation Board, Respondent.

Appeal by claimant from a decision of the Workmen's Compensation Board affirming a decision of the Referee which disallowed his claim for disability benefits.

On February 11, 1943 claimant was injured in the course of his employment when a box which he was filling with mallets toppled from an adjacent bench upon which it was resting, struck a ladder upon which he was standing and caused him to fall. As the result of the accident he sustained facial and other abrasions, a finger injury and a contusion of the lower back. Claimant returned to work on February 18, 1943 with no compensable time loss. On December 1, 1943 the claim was closed with an award for permanent facial disfigurement.

Upon application of claimant the case was reopened and restored to the Referee's calendar by order of the board dated June 30, 1944 "for consideration of the claimant's disability." On July 31, 1944 claimant was examined by a board physician who reported that although claimant complained of mild pain in the lower back he found no

muscle spasm or rigidity and "[n]o defects in the back." He recommended future reexamination with the aid of X rays. On February 23, 1945 another staff physician of the board examined claimant, noted complaints of pain in the dorsal lumbar region of the back and reported that X rays of the cervical, dorsal, lumbar spine and pelvis revealed osteoarthritic changes. His examination disclosed no rigidity of the back muscles. Restricted mobility of the head because of pain upon forward bending was observed. The examiner found claimant to have considerable earning capacity. On May 18, 1945 the same physician reexamined claimant. He again received complaints of pain in the dorsolumbar back and reported that claimant held his back rigidly which restricted full mobility of the trunk. No complaints referable to the cervical area of the spine were made at that time. His estimate of claimant's earning capacity was the same as he had previously indicated. Upon these reports and claimant's statement that he had sustained no loss of earnings, the Referee again closed the claim on the previous award.

On June 12, 1958 claimant filed a second application to reopen the case which the board granted. The supporting C-27 medical report executed by his treating physician stated that claimant was suffering from Parkinson's disease and hypertrophic arthritis of the lower spine "where he was injured in his accident" and that he was presently disabled. Pursuant to section 25-a of the Workmen's Compensation Law the Referee relieved the carrier of liability and imposed responsibility for any future award upon the Special Fund for Reopened Cases. Thereupon it undertook the defense of the claim.

At subsequent hearings before the Referee claimant's physical condition, employment statuses, treatment and the medical diagnoses of his maladies during the years which followed the injury were explored at length. Claimant

contended that the disabling back pain of which he complained resulted from the traumatic aggravation of pre-existing osteoarthritis of the spine. Special Fund maintained that Parkinson's disease long existent before its formal diagnosis in 1956 produced the disablement. There was medical opinion evidence by examining orthopedic specialists to support each thesis of causal relationship. Doctor Campanella, testifying in favor of causality, essentially based his judgment upon the hypotheses of the complete absence of pain in the lumbodorsal area of the spine prior to the accident, a history of its constant recurrence thereafter and X-ray disclosure of pre-existing osteoarthritis in the spinal region. Trauma, he stated, commonly transmuted an osteoarthritic spine from an asymptomatic to a symptomatic status. Special Fund's expert, Doctor Balenszweig, found claimant's osteoarthritic condition to be minimal and consistent with his age, reasoned that had the injury accentuated it the change would have been more extensive and concluded that the substantial disability was due primarily to Parkinson's disease and unrelated to the injury of February 11, 1943.

Upon completion of the proof the Referee found that "claimant's back disability" was not related to the accident and disallowed the claim. Claimant applied to the board for a review of his decision. While the matter was *sub judice* the board panel, over claimant's protests, referred the case to the chairman of the board for the designation of an impartial orthopedist to examine claimant and to report his opinion on the question of causally related disability.

Doctor Cohen, the designee, twice physically examined claimant and reviewed the entire case file. X-rays taken at his direction revealed moderate osteoarthritis of the lumbar spine and mild osteoarthritis of both hips. He reported and testified that claimant's disability and complaints of pain were due primarily to Parkinson's disease

and that his back condition was not causally related to the accident.

Upon the return of the completed record the same board panel found "that the claimant's disability is due to a pre-existing osteoarthritic condition, Parkinson's disease, and cardiac condition and that the claimant's disability has no relation to the accidental injury of February 11, 1943."

On appeal claimant contends that the findings of the board are against the weight of the credible evidence when the record is read as a whole. Our limited jurisdiction does not permit us to weigh the evidence. We perceive no basis to reject Doctor Balenszweig's testimony as insufficient in law. (Cf. *Matter of McCormack* v. *National City Bank*, 303 N. Y. 5.) Thus the expert opinion evidence created an issue of fact the resolution of which was within the exclusive province of the board. (*Matter of Palermo* v. *Gallucci & Sons*, 5 N Y 2d 529, 532.) We find substantial evidence in the record to sustain its decision.

The referral of the case in the review stage of the proceedings to an impartial specialist for a report on the issue of causal relationship was discretionary with the board. (Workmen's Compensation Law, § 13, subd. [d]; *Murphy* v. *Niagara Mohawk Power Corp.*, 9 A D 2d 805.) In the then state of the record its action impresses us as provident and not arbitrary. Appellant's other contentions cited as grounds for reversal that he was denied a fair trial, due process of law and equal protection of the laws and was not accorded the benefits of the presumptions favoring working men under the Workmen's Compensation Law are without warrant in the record and basis in the law.

Decision of the Workmen's Compensation Board unanimously affirmed, without costs.

Present—Bergan, P. J., Gibson, Herlihy, Reynolds and Taylor, JJ.

Appendix

NEW YORK CIVIL PRACTICE ACT

"**§ 588. Appeal as of right.** Appeal to the court of appeals as of right lies only

1. from a judgment or order of the appellate division, provided that the judgment finally determine an action, or the order finally determine a special proceeding, and provided further that

(a) there be directly involved the construction of the constitution of the state or of the United States * * *"

"**§ 589. Appeal by permission.** Appeal to the court of appeals by permision lies only * * *

3. either

(a) by permission of the appellate division granted before application to the court of appeals for permission to appeal, and in case of refusal of such permission, by permission of the court of appeals, or

(b) by permission of the court of appeals upon application made directly to that court, from a judgment or order of the appellate division, or of the court of original instance, which is not appealable as of right only because it does not comply with provision (a) or (b) of subdivision one of section five hundred and eighty-eight of this act. * * *"

"**592. Limitations of time; procedure to obtain permission to appeal.** Appeals and applications for permission to appeal to the court of appeals pursuant to this article shall be subject to the following limitations of time:

1. An appeal as of right to the court of appeals must be taken within sixty days after service upon the attorney for the appellant of a copy of the judgment or order appealed from and a written notice of the

entry thereof. The party entering the judgment or order, or serving the notice of the entry thereof, shall not, however, be entitled to notice to limit his time to appeal. * * *

3. An application to the court of appeals for permission to appeal must be made by serving all required papers within thirty days after service of a copy of the order of the appellate division denying permission to appeal, with notice of entry thereof, or, if the application be made directly to the court of appeals, within thirty days after service of a copy of the judgment or order sought to be appealed from, with notice of entry thereof, and the application will then be deemed returnable at the next motion day in the court of appeals occurring more than four days after such service. * * *

5. Notwithstanding any of the foregoing limitations,

(a) An appeal as of right to the court of appeals may be taken within thirty days after entry of an order denying an application for permission to appeal upon the ground that the appeal would lie as of right; * * *

(d) An appeal taken to the court of appeals pursuant to permission shall not be dismissed upon the ground that the appeal would lie as of right and was not taken within the time limited for an appeal as of right, provided the proceedings to obtain such permission were begun within the time limited for an appeal as of right; * * *"

WORKMEN'S COMPENSATION LAW

"§ 13. Treatment and care of injured employees * * *

(d) The board, on its own motion, or a referee, upon the recommendation of the compensation medical di-

rector for the board, hearing a claim for compensation may require examination of any claimant, or of the testimony, reports and exhibits, or both, by a physician especially qualified with respect to the diagnosis or treatment of the disability for which compensation is claimed; and may require a report from such physician on the diagnosis, the causal relationship between the alleged injury and subsequent disability or death, proper treatment, and the extent of the disability of such claimant. The employer or his insurance carrier shall pay for such examination in an amount to be directed by the chairman.

The chairman may in his discretion designate physicians of outstanding qualifications in such fields of medicine as he deems essential in order to ascertain the diagnosis, the causal relationship between the alleged injury and subsequent disability, the type of medical care and operative procedure requisite in particular cases where such matters are not readily determinable by the regularly employed medical examiners of the board. Each of such physicians shall have had, prior to his designation, at least ten years of practice in the field with respect to which he is designated, and shall receive a fee for each case, or shall be paid on a per diem basis, as determined by the chairman. Claimants may be required to submit to examination by such physicians in the manner hereinbefore specified. The contents of reports of designated physicians when introduced in evidence shall constitute *prima facie* evidence of fact as to the matter contained therein, and the makers of such reports shall be subject to examination upon demand and shall be paid an additional fee, as determined by the chairman, for testifying in each case * * *".